LIABILITY FOR SUBSTANTIAL PHYSICAL DAMAGE TO LAND BY BLASTING— THE RULE OF THE FUTURE[1]

Class 1. Where defendant's blasting has cast rocks or other tangible substances upon plaintiff's premises, thereby doing substantial physical damage to land or buildings, it is now commonly said that defendant is absolutely liable, and that it is unnecessary to prove negligence.

This view is now commonly asserted by the great weight of authority. A leading case is *Hay* v. *Cohoes Co.*[2] Authorities likely to be cited to-day as sustaining this view are given in the footnote.[3] Whether the result reached in these cases could be better rested on another ground will be considered later.

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[1] Notice that we are here considering only instances where blasting inflicts substantial physical damage on land or buildings. We are not now dealing with cases where continuous annoyance renders land untenantable or materially reduces the rental value, but without doing physical damage to the land itself or the buildings thereon.

[2] 2 N. Y. 159 (1849).

[3] Hay *v.* Cohoes Co., 2 N. Y. 159 (1849); Tremain *v.* Cohoes Co., 2 N. Y. 163 (1849); Scott *v.* Bay, 3 Md. 431, 446 (1853); Adams *v.* Sengel, 177 Ky. 535, 197 S. W. 974 (1917) (citing earlier Kentucky cases); Bessemer Coal Co. *v.* Doak, 152 Ala. 166, 44 So. 627 (1907); Central Co. *v.* Vandenheuk, 147 Ala. 546, 41 So. 145 (1906); Somerville, J., in *Ex parte* Birmingham Realty Co., 183 Ala. 444, 448, 63 So. 67 (1913); Mulchanock *v.* Whitehall Mfg. Co., 253 Pa. St. 262, 267, 98 Atl. 554 (1916); s. c. L. R. A. 1917 A, 1015; Johnson, J., in Knight *v.* Donnelly, 131 Mo. App. 152, 163, 110 S. W. 687 (1908); Henry Hall Sons Co. *v.* Sundstrom Co., 138 App. Div. 548, 123 N. Y. Supp. 390 (1910); affirmed without opinion in 204 N. Y. 660, 97 N. E. 1106 (1912); Interborough Rapid Transit Co. *v.* Williams, 168 N. Y. Supp. 688 (1918); E. T. Bartlett, J., in Page *v.* Dempsey, 184 N. Y. 245, 251, 77 N. E. 9 (1906); Forrester *v.* O'Rourke & Co., 48 Misc. 390, 95 N. Y. Supp. 600, 601 (1905); Vann, J., in Sullivan *v.* Dunham, 161 N. Y. 290, 300, 55 N. E. 923 (1900) (as to reasons for decision in Hay *v.* Cohoes Co.).

In Gourdier *v.* Cormack, 2 E. D. Smith (N. Y. Com. Pleas), 200 (1853), one effect of the blasting was to split out (force out?) rocks three or four feet under the foundation of plaintiff's house. The judgment below for defendant was reversed. It is not entirely clear whether the splitting out of the rocks was the result of concussion (result of the force of the blast) or was caused by pieces of rock thrown by the blast. The defendant's liability, whether his conduct was negligent or not, seems rested on the authority of Hay *v.* Cohoes Co., 2 N. Y. 159, 162 (1849).

The authorities favoring the view asserted in Class 1 do not restrict its application to damage done to land or buildings. It has been regarded as extending to cases where missiles thrown from a blast have hit, or damaged, an individual who was upon land where he had a right to be. This includes not only an individual who was upon his own land, but also a laborer at work upon his employer's premises,[4] or a traveler upon the highway struck by blasting done by defendant upon his adjacent premises.[5]

Class 2. Where substantial physical damage is done to plaintiff's land or building by vibrations or concussions due to blasting, but no tangible substance is thrown upon plaintiff's premises, it has been held by some authorities: first, that the case differs in principle from Class 1; and second, that the defendant is not liable unless negligence is proved.

This view is sustained in New York. The leading case is *Booth* v. *Rome, etc. R. R.*,[6] and it is supported by the authorities given in the note below.[7]

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[4] St. Peter *v.* Denison, 58 N. Y. 416 (1874).

[5] Sullivan *v.* Dunham, 161 N. Y. 290, 55 N. E. 923 (1900); Wright *v.* Compton, 53 Ind. 337 (1873).

In Turner *v.* Degnon, etc. Co., 99 App. Div. 135, 90 N. Y. Supp. 948 (1904), "a traveler was struck while upon a city street by a stone thrown by a blast set off by a contractor engaged in constructing an underground railway," described as "a public improvement authorized and directed by the legislature." (See statement of case in 1 BOHLEN'S CASES ON TORTS, 611, note 2.) The Appellate Division held, by three judges against two, that the plaintiff could recover.

In Miller *v.* Twiname, 129 App. Div. 623, 114 N. Y. Supp. 151 (1908), defendant was a contractor building a highway. Plaintiff, who was bringing him coal, was hit by a blast while on the highway, which was then in the lawful possession of the defendant. Held, that plaintiff, at the time he was injured, was not a traveler upon a public highway within the rule declared in Sullivan *v.* Dunham, 161 N. Y. 290, 55 N. E. 923 (1900).

[6] 140 N. Y. 267, 35 N. E. 582 (1893), overruling the decision in the lower court, 44 N. Y. St. 9 (1892).

[7] The Booth case has repeatedly been reaffirmed in New York. See, for instance, Holland House *v.* Baird, 169 N. Y. 136, 62 N. E. 149 (1901). For authorities in other states, approving the Booth case, see Simon *v.* Henry, 62 N. J. L. 486, 41 Atl. 692 (1898); Cherryvale *v.* Studyvin, 76 Kan. 285 (1907), Smith, J.; *ibid.*, 287–288; Rost *v.* Union Pacific R. R., 95 Kan. 713, 714, 149 Pac. 679 (1915), West, J. (In both these Kansas cases the plaintiff recovered. The court held that the evidence in each case justified the jury in finding negligence.) Simpson, J., in Bessemer, etc. Co. *v.* Doak, 152 Ala. 166, 177, 44 So. 663 (1907).

In New York, where distinction between the Hay case and the Booth case is still upheld, troublesome questions sometimes arise as to which of these two precedents

Outside of New York, the cases are not unanimous. The weight of recent authority is against the New York view that Class 2 is distinguishable in principle from Class 1. Cases to this effect (contrary to the New York view) are cited in the note below.[8]

Query: Whether the rejection of the view taken in the Booth case, as to the alleged distinction between Class 2 and Class 1, necessitates the rejection of the further view taken in the Booth case — that negligence is the test (the requisite) of liability in cases of vibration and concussion. This question will be considered later.

Is the above distinction between Class 1 and Class 2 tenable?

We think not. Defendant's liability (the test of liability), whatever it may be, should be the same in both cases. This is upon the assumption that there is no difference between the two classes, except the one therein indicated: *viz.*, as to the manner in which the damage is inflicted by the blast.

In the leading case of *Booth* v. *Rome, etc. R. R.*[9] the principal reasons[10] given for distinguishing Class 2 from Class 1 are: that in

govern a new case; as to when it may be said that the blast has thrown tangible substances upon the plaintiff's premises. Compare, for instance, Wheeler *v.* Norton, 92 App. Div. 368, 86 N. Y. Supp. 1095 (1904), with Derrick *v.* Kelly, 136 App. Div. 433, 120 N. Y. Supp. 996 (1910), and Adler *v.* Fox, 74 Misc. 483, 132 N. Y. Supp. 302 (1911). See also Conron *v.* Fox, 90 Misc. 425, 153 N. Y. Supp. 425 (1915), and Conwell *v.* Degnon & Co., 154 N. Y. Supp. 182 (1915).

[8] Fitzsimmons & Co. *v.* Braun, 199 Ill. 390, 65 N. E. 249 (1902); Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395 (1886); Watson *v.* Mississippi, etc. Co., 174 Iowa, 23, 156 N. W. 188 (1916); Louden *v.* City of Cincinnati, 90 Ohio St. 144, 106 N. E. 970 (1914); Patrick *v.* Smith, 75 Wash. 407, 134 Pac. 1076 (1913); Longtin *v.* Persell, 30 Mont. 306, 76 Pac. 699 (1904); Schade, etc. Co. *v.* Chicago, etc. R. R., 79 Wash. 651 (1914); Parker, J., *ibid.*, 658–659.

[9] 140 N. Y. 267, 35 N. E. 592 (1893).

[10] In Hill *v.* Schneider, 13 App. Div. 299, 43 N. Y. Supp. 1 (1897), the decision in the Booth case is explained as being based on special concessions made by defendant during the argument of that case, in substance: (1) that the blasting was necessary in order to adapt defendant's premises to a lawful use, and (2) that it was conducted with due care. As to the alleged concessions, see 140 N. Y. 267, 269, 35 N. E. 592 (1893), and Andrews, C. J., 274; and comments of Rumsey, J., in 13 App. Div. 299, 305, 306, 43 N. Y. Supp. 1 (1897).

See also discussion in later part of this article as to the contention that the blasting was "necessary," and that the defendant, in blasting, was only making a reasonable use of his land (was only reasonably exercising his rights as a landowner). In regard to the latter position Mr. Lewis says that the decision in the Booth case "would seem to be fairly open to criticism." See 9 LEWIS, AM. R. R. AND CORP. REP. 103.

Class 2 the damage is "consequential"; that there is "no technical trespass"; and that there is "no physical invasion." [11]

None of these reasons are satisfactory.

The term "consequential damage" is an equivocal one. On the one hand, it is sometimes used to denote damage which is so remote a consequence of an act that the law affords no recovery for it. It is thus used as practically "synonymous with non-actionable." On the other hand, it is used to denote damage which, though distinctly traceable to defendant's tort as the effective cause, did not follow immediately upon the doing of the act complained of; what Sir William Erle aptly terms "consequential damage to the actionable degree." [12] In the latter case, as in the present instance, the term "merely indicates that the action must be in Case rather than in Trespass." [13]

"For it can hardly be supposed that a man's responsibility for the consequences of his act varies as the remedy happens to fall on one side or the other of the penumbra which separates trespass from the action on the case." [14]

"The phrase 'consequential damage' has never served any useful purpose except in marking a distinction between damage which was formerly recoverable in an action of case and that which was formerly recoverable in an action of trespass." [15] Mr. Salmond [16] says that the term is now "merely an inheritance from an obsolete system of procedure." [17]

If the term is appropriate here, it must be taken as used in the second sense above stated; and as denoting "consequential damage to the actionable degree." But we submit that the term does not apply at all to a case like *Booth* v. *Rome, etc. R. R. Co.* We concur with the view expressed by Macomber, J., in the report of the Booth case in the court below,[18] that the damage here was direct, and not in any sense consequential.

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[11] 140 N. Y. 267, 279, 280, 35 N. E. 592 (1893).

[12] See Brand *v.* Hammersmith & C. R. Co., L. R. 2 Q. B. 223, 249 (1867).

[13] 10 COL. L. REV. 465, 467.

[14] HOLMES, THE COMMON LAW, 80.

[15] 17 COL. L. REV. 383, 388.

[16] TORTS, 4 ed., 184, note 7.

[17] See also discussion by present writer: 15 COL. L. REV. 13–14; 17 COL. L. REV. 383, 388; 25 HARV. L. REV. 223, 250–251; Eaton *v.* B. C. & M. R. R., 51 N. H. 504, 519–521 (1872). See also Doe, J., in Thompson *v.* Androscoggin R. R. Co., 54 N. H. 545, 550–554 (1874). And see 10 COL. L. REV. 465, 467.

[18] See 44 N. Y. St. 9, 11 (1892).

As to the objection that there is "no technical trespass:"

This objection seems founded on the theory that there is a distinction in principle, as to liability for damage to real estate, between cases where the remedy at common law, if there were any remedy, would have been an action of trespass, and cases where that form of action would not have been an appropriate remedy under the old common-law system of procedure. It was formerly supposed that if the facts of a case (excluding defenses) would have constituted a *primâ facie* foundation for an action of trespass, then the defendant could not clear himself by proving an entire absence of fault on his part.[19] But this view no longer prevails in England since the decision in 1890 of the case of *Stanley* v. *Powell*,[20] and it had previously been rejected in this country.[21] Hence the rule of liability for blasting cannot depend on the question whether an actual physical trespass upon the *res* has been committed; nor is it material to inquire whether "the vibratory effects of blasting cannot constitute an actual trespass." [22]

To this objection — that there is "no technical trespass" — it would be a sufficient general answer to say that substantive law is no longer "controlled by the forms of procedure." To determine a question of substantive law it is not now necessary to discuss the refined technical distinctions by which the common-law system of forms of action was "perplexed and incumbered." Professor Maitland says that now "the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law." [23] But notwithstanding Professor Maitland's sweeping statement, this desirable result is not yet completely achieved. Unreasonable though it may be, it must be admitted that sometimes "the substantive obligations imposed by law are still influenced by the old forms." [24] Indeed, Professor

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[19] See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 74, 75.

[20] L. R. [1891] 1 Q. B. 86.

[21] See Brown *v.* Kendall, 6 Cush. (Mass.) 292 (1850); Brown *v.* Collins, 53 N. H. 442 (1873); 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 80.

[22] See Willard Bartlett, J., in Sullivan *v.* Dunham, 10 App. Div. 438, 442, 41 N. Y. Supp. 1083 (1896).

[23] MAITLAND, EQUITY AND FORMS OF ACTION, 375.

[24] ROBERT CAMPBELL, PRINCIPLES OF ENGLISH LAW, 425.

Maitland himself says: "The forms of action we have buried, but they still rule us from their graves." [25]

The objection that there is "no physical invasion" is sufficiently answered in the following quotations from recent opinions.

The New York court attempts a distinction

"by pointing out that, in the Cohoes case and in others following it, the injury was done by casting debris upon the plaintiff's premises; while in cases of the kind we have now before us, the injury complained of results from concussion of the atmosphere, or from vibrations of the earth. The former, it is said, constitutes a physical invasion, a trespass, upon the plaintiff's property, while the latter does not. The deduction is neither obvious nor convincing. Physical invasion of the property of another does not necessarily imply an actual breaking or entering of the plaintiff's close by the wrongdoer in person, or casting upon his premises any particular kind of missile or other particular thing or substance. The employment of force of any kind which, when so put in operation, extends its energy into the premises of another to their material injury, and renders them uninhabitable, is as much a physical invasion as if the wrongdoer had entered thereon in person and by overpowering strength had cast the owner into the street. . . . It has often been held that the casting or discharge of noxious vapors or gases into the air, which, spreading abroad, invade the home or place of business of another, constitutes an actual wrong. In a legal sense how does an injury inflicted by the act of one who casts a rock against his neighbor's house or destroys his property by turning loose the ungoverned energy of water in motion differ from an injury caused by one who voluntarily imparts destructive force and energy to the air, or who, by the use of the almost limitless powers of modern explosives, creates a little earthquake?" [26]

"It is insisted by counsel for defendants in error that because no rock, soil or debris was actually thrown upon plaintiff's premises there was no actual trespass. . . . We are unable to distinguish between a case where a fragment of rock or a portion of the soil is thrown onto an adjoining property and a case where the force of an explosion is transmitted through the soil and substratum, jarring, cracking and breaking it, destroying the cistern and foundation of the building and wrecking the building

[25] MAITLAND, EQUITY AND THE FORMS OF ACTION, 296. Compare Professor J. W. Salmond, 21 L. QUART. REV. 43, quoted in 30 HARV. L. REV. 245. And see further discussion in a later part of this article.

[26] Weaver, J., in Watson *v.* Mississippi, etc. Co., 174 Iowa, 23, 31, 32, 156 N. W. 188 (1916).

itself by a concussion of the air around it, thereby doing far more injury than a fragment of rock could do. It is a distinction without a difference. . . . Is not a concussion of the air and jarring, breaking and cracking the ground with such force as to wreck the buildings thereon as much an invasion of the rights of the owner as the hurling of a missile thereon? If there is any difference whatever, it is purely technical, and ought to find no favor with the courts. Certainly the application of a force sufficient to crack the surface of the land to such a depth as to destroy the foundations of buildings, to break windows, and throw down chimneys, is a direct invasion of property rights." [27]

"We see no valid reason why recovery should be permitted for damage done by stones, or dirt thrown upon one's premises by the force of an explosion upon adjoining premises, and not be permitted for damage resulting to the same property from a concussion or vibration sent through the earth or the air by the same explosion. There is really as much a physical invasion of the property in one case as there is in the other. The force does the injury in both cases, and the fact that it causes stones or other *débris* to be thrown upon the land in one case, and in the other only operates by vibrations or concussions through the earth or air, seems to us to be immaterial.

"It is perhaps true that an action of trespass could not be maintained in the latter case, because there would be no breaking of the close by the entry of any person or thing; but there would seem to be no reason, on principle, why an action of the case could not be maintained when the injury is really of the same character and is caused by the same powers intentionally set in motion by the defendants, knowing that they will be projected through the earth and air and may cause damage to the plaintiff's property. In such case, one who thus causes dangerous forces to pass through another's property should be held liable for the damage directly resulting therefrom. And there is no more reason for requiring that negligence be shown in the one case than in the other." [28]

Thus far, we have been considering the question whether there is, or should be, any difference between the liability of a blaster in Class 1 and in Class 2. And our conclusion is, that there should be no distinction in liability between the two classes if there is no difference between the two except the one above stated; *i. e.*, as to the manner in which the blast affected the land.

[27] Donahue, J., in Louden *v.* City of Cincinnati, 90 Ohio St. 144, 158, 159, 106 N. E. 970 (1914).

[28] Johnson, J., in Hickey *v.* McCabe, 30 R. I. 346, 355, 356, 75 Atl. 404 (1910). See also Gose, J., in Patrick *v.* Smith, 75 Wash. 407, 134 Pac. 1076 (1913); Holloway, J., in Longtin *v.* Persell, 30 Mont. 306, 313, 76 Pac. 699 (1904).

But back of this question whether there is any substantial distinction between the two classes there lies a more fundamental inquiry. Assuming that one and the same rule of liability should apply to both the above cases, what should that rule be and upon what principle should it be based? Shall it, in both cases, be the rule of absolute liability — the blaster acting at peril; or shall there be liability only in case of negligence? If the latter, the negligence may consist (1) in making an attempt to blast at all, at the place and time in question; or it may consist (2) in negligently conducting blasting operations when undertaken at a proper time and place.

The alternative result is correctly stated in a note in 27 HARVARD LAW REVIEW,[29] where the annotator, after saying "There seems no sufficient reason for distinguishing these two classes of cases," adds:

"and the law should either treat blasting as an action at peril and give a recovery in both, or it should deny it in both and only apply the test of negligence aided by the doctrine of *res ipsa loquitur*." [30]

In attempting to decide which of these alternative views should be adopted, two things should be noticed:

First: An attempt to extract an answer from the language of the authorities is made difficult by the fact that the law is now in a state of transition; and that the old phraseology is still used by some courts which are really adopting as their *ratio decidendi* more modern views.[31] The literal language at present used by some judges may fail to indicate their tendency to change the law, or to suggest the probable rule of the future.

Second: A decision as to which of the above alternative views should be adopted is not now, in the great majority of cases, of such vital importance to the plaintiff as it might once have been. If the defendant is *not* held to act at peril, yet a plaintiff who has a meritorious case can generally succeed on the ground of negligence,

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[29] Pages 188, 189.

[30] Of course, the blasting differs from an accidental explosion of a powder magazine in this: that in blasting the explosion is intentionally produced. Compare EARL, COM., in Losee *v.* Buchanan, 51 N. Y. 476, 480 (1873), and Vann, J., in Sullivan *v.* Dunham, 161 N. Y. 290, 294, 55 N. E. 923 (1900). But, though the defendant intends to produce the explosion, he does not, in the cases now under discussion, "intend," in the sense of "desiring," to produce the damage which actually results to the plaintiff.

[31] "Legal phraseology is, however, the part of the law which is the last to alter." MAINE, ANCIENT LAW, 1 Eng. ed., 337–338.

which is a modern conception with a scope and effect much enlarged in these later years.

Formerly, a plaintiff might have been allowed to recover against a faultless defendant, on account of the fact that the plaintiff's property which was damaged consisted of real estate. He might, perhaps, have recovered not only on account of (or irrespective of) the dangerous instrumentality used by defendant, but also (as a distinct ground) on account of the peculiar protection which the law was supposed to afford to the ownership and occupancy of real estate. This is spoken of as "the sanctity which the ancient common law attached to ownership and occupancy of real property," and especially "to one's dwelling-house." [32] But to-day the better view is that an unintentional entry upon, or damage to, real estate is not generally actionable in the absence of fault. In some quarters entitled to respect [33] "there is still a tendency to hold that, when real estate is damaged or invaded, the old rule of absolute liability remains unchanged." But the weight of modern authority is otherwise.[34]

The history of law as to the former absolute liability in the absence of fault, and as to the present general requirement of fault as a requisite to liability, can be stated very briefly. Speaking generally, the modern law is a reversal of the ancient law.

In old days it was the general rule that a man, though acting entirely without fault, was liable for the damaging consequences of his innocent acts. In some cases where this doctrine worked extreme hardship, an innocent actor was exonerated; but these instances of nonliability were exceptions.

At the present time, it is the general rule that fault is requisite to liability. In rare instances the law imposes liability in the absence of fault; cases where a defendant is held to have "acted at peril." But these instances are exceptions to the general rule which requires fault as an element of liability.[35]

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[32] See 1 THOMPSON ON NEGLIGENCE, § 764.

[33] See MARKBY, ELEMENTS OF LAW, 3 ed. § 711.

[34] See discussion and citations in article by present writer, 30 HARV. L. REV. 319, 321–323; and SALMOND ON TORTS, 4 ed., 186.

[35] These exceptions are attempted to be justified on the ground that they are cases of "extra hazardous uses." It is alleged that there are various classes of extra hazardous acts "which are performable only at the peril of the doer." Some prominent in-

The earlier and later standards are thus compared by Professor Ames:

"The early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of to-day, except in certain cases based upon public policy, asks the further question 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." [36]

The gradual adoption of the modern and now prevailing doctrine — that fault is generally a requisite element of liability in tort — has naturally induced an examination of the essence of fault in the legal sense. And this has given rise to the modern conception of a particular fault which formerly was hardly mentioned; *viz.*, negligence.

The three following paragraphs, I, II, and III, are here substantially reprinted from an article by the present writer on "Tort and Absolute Liability" in 30 HARVARD LAW REVIEW.[37]

I. The doctrine that a man, in certain cases, acts at peril and is absolutely liable for nonculpable accidents is, as we have already said, a survival from the early days when *all* acts were held to be done at the peril of the doer. When the courts, in more recent times, were gradually coming to adopt the doctrine that fault is generally a requisite element of liability in tort, the law on the subject of liability for negligence was not so fully developed as it is now. If the wide scope and far-reaching effect of the law of negligence had then been fully appreciated, it is quite

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stances (including blasting) are enumerated in 30 HARV. L. REV. 319, 329–334. This doctrine imposing absolute liability for nonculpable accident — this holding that a man in certain cases acts at his peril — is regarded unfavorably by some of the best modern text writers. (See SALMOND ON TORTS, 4 ed., Preface v; POLLOCK'S LAW OF TORTS, 10 ed., 505, 511, 671, note *s*; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 84, 85.) One objection to this classification is found in the difficulty of drawing "the line between the danger which calls for care and the 'extra' hazard." "There are, as yet, no unanimously approved rules or criteria" as to this subject. (See Professor E. R. Thayer, 29 HARV. L. REV. 801, 811.) The highest English court some fifty years ago, in Rylands *v.* Fletcher, L. R. 3 H. L. 330, 339–340 (1868), undertook to lay down the so-called Blackburn Rule. But this rule "has not met with universal and cordial approval by English lawyers" (see SALMOND ON TORTS, 4 ed., Preface; POLLOCK'S LAW OF TORTS, 10 ed., 671, note *s*); and it is "rejected by what we consider the decided weight of American authority." See 30 HARV. L. REV. 409, 413, note 14.

[36] 22 HARV. L. REV. 99.

[37] Pages 409, 413–415.

probable that the courts would not have thought it necessary to retain any part of the old law of absolute liability for application in certain exceptional instances.

II. There was "a time when the common law had no doctrine of negligence." It has been said that, in the earlier stages of the law, "there is no conception of negligence as a ground of legal liability." In Holdsworth's "History of English Law," [38] the author speaks of "the manner in which the modern doctrines of negligence have been imposed upon a set of primitive conceptions which did not know such doctrines." Mr. Street says that the law of negligence "is mainly of very modern growth." "No such title is found in the year books, nor in any of the digests prior to Comyns (1762–67)." [39] Sir Frederick Pollock [40] says: "The law of negligence, with the refined discussions of the test and measure of liability which it has introduced, is wholly modern; . . ." Professor E. R. Thayer [41] says "that law" (the law of negligence) "is very modern—so modern that even the great judges who sat in *Rylands* v. *Fletcher* can have had but an imperfect sense of its reach and power." ". . . the law of negligence in its present development is a very modern affair, rendering obsolete much that went before it." [42]

III. At the present time it is generally unnecessary, in order to do justice to a plaintiff, to adopt the doctrine of acting at peril.[43] Professor E. R. Thayer says: ". . . the law has at its hands in the modern law of negligence the means of satisfying in the vast majority of cases the very needs which more eccentric doctrines are invoked to meet." [44] If the case is a meritorious one and proper emphasis is laid on the test of "due care *according to the circumstances*," then "the theory of negligence" will generally be "sufficient to carry the case to the jury." "How powerful a weapon the modern law of negligence places in the hands of the injured person, and how little its full scope has been realized until recently, is well shown by the law of carrier and passenger. . . ." [45]

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[38] Vol. 3, p. 306.

[39] 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 182.

[40] 27 ENCYCLOPAEDIA BRITANNICA, 11 ed., 66.

[41] 29 HARV. L. REV. 805.

[42] *Ibid.*, 814.

[43] In some American cases the courts, while deciding in favor of the plaintiff, have approved the Blackburn Rule in Rylands *v.* Fletcher. But in the great majority of these cases the facts did not call for an application of that rule; the defendant being liable on other grounds, frequently on the grounds of his negligence. See Professor Bohlen, 59 UNIV. OF PA. L. REV. 423, 433–439. See *post*, that by the weight of modern authority the decision for plaintiff in the case of Rylands *v.* Fletcher itself might have been based on negligence.

[44] 29 HARV. L. REV. 815.

[45] *Ibid.*, 805.

At the present time, in an action for blasting, if the courts apply the modern law as to negligence, a plaintiff who has a meritorious case can generally recover without calling in aid the old rule of absolute liability (acting at peril).[46]

The plaintiff is likely to derive material assistance from two doctrines, one as to the amount of care required from defendant, the other as to the method of proving negligence.

Assuming that there are no degrees of care *as matter of law*, yet there must obviously be a great difference in the amount of care required in various cases *as matter of fact*. A jury will be told, and will usually find, that the amount of care required *in fact* will increase in proportion to the danger to be apprehended in case of neglect. Hence they will generally find that the amount of care required of a blaster is *in fact* very great.[47]

But not only is great care in fact required of the blaster. In addition the plaintiff is much aided, as to the method of proving defendant's absence of care, by the application of the doctrine of *res ipsa loquitur*.

This rule, taken literally, and without explanation, is liable to misapprehension.

The doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only

[46] The plaintiff could not now safely rely on the former theory as to the sanctity of real estate (see *ante*, and see 30 HARV. L. REV. 319, 321–323), but he generally does not need help from that theory.

[47] Denver Electric Co. *v.* Simpson, 21 Col. 371, 41 Pac. 499 (1895), was an action to recover for negligence in the use of electricity. The trial judge charged, as matter of law, that the defendant, though not an insurer, was bound to "the highest degree of care, skill and diligence" in the construction and maintenance of its lines and in carrying on its business. There was a verdict for the plaintiff, which the Supreme Court refused to set aside. The court held, in substance, as follows: The instructions were erroneous as matter of legal theory or phraseology; but no injustice was done in this case. Colorado does not recognize degrees of negligence or of care, *as matter of law*. The jury should have been instructed that the defendant company was bound to exercise "that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances"; with the additional instruction that (under the foregoing standard) the care (required in fact) increases as the danger does. But the jury, if so instructed, would have unquestionably found that this standard (of the care of the ordinary prudent man under the circumstances) required, in fact, the exercise of the highest degree of care. Hence no harm was done by the judge's erroneously telling the jury that *the law* required the highest degree of care, when the jury (under the ordinary prudent man standard) would have found, *as matter of fact*, that ordinary prudence would have required the exercise of the highest degree of care in this case.

to the mode of proving it. The isolated fact that an accident has happened does not afford *primâ facie* evidence that the accident was due to the negligence of the defendant. But if the accident, viewed in the light of the surrounding circumstances, is one which "commonly does not happen except in consequence of negligence," then, if no explanation is offered, the jury *may*, not *must*, find that it was due to the negligence of the defendant. There is, however, no presumption of law, or fact, to this effect. The existence of negligence is "an inference which the jury are authorized to draw, and not an inference which the jury are compelled to draw."

This rule, even on a very conservative statement of it, would permit a jury to find the fact of negligence (a *primâ facie* case of negligence) in a very large proportion of instances of damage due to the blasting, and the jury would often so find.

One reason why juries are permitted to apply, and are generally willing to apply, this rule in blasting cases, is found in the great difficulty, not to say impossibility, of proving specific acts of negligence on the defendant's part. By the explosion, "every trace of the material used and the methods employed are usually blown out of sight, and beyond all possibility of direct proof, except by witnesses who will be naturally unwilling, if not hostile."[48]

The adoption by the courts of another rule favorable to plaintiff is not impossible; *viz.*, shifting upon the defendant the burden of proof as to care. Sir Frederick Pollock, in his draft of an Indian Civil Wrongs Bill, section 68, proposed a provision that a person keeping dangerous things is bound to take all reasonably practicable care to prevent harm, and is liable as for negligence to make compensation for harm, unless he proves that all reasonable practicable care and caution were in fact used.[49] In his work on the common law of torts, in discussing cases like *Rylands* v. *Fletcher*, he says:

". . . one does not see why the policy of the law might not have been satisfied by requiring the defendant to insure diligence in proportion to the manifest risk (not merely the diligence of himself and his servants, but the actual use of due care in the matter, whether by servants, contractors, or others), and throwing the burden of proof on him in cases where the matter is peculiarly within his knowledge." [50]

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[48] See Stiles, J., in Klepsch *v.* Donald, 4 Wash. 436, 439, 30 Pac. 991 (1892).

[49] POLLOCK ON TORTS, 6 ed., 623–624.

[50] POLLOCK ON TORTS, 10 ed., 511.

As to the present tendency of the courts in regard to imposing absolute liability in exceptional cases of nonculpable accidents:

On the one hand, there is a judicial tendency to extend (to recognize more fully) the obligation of using care; to call some conduct negligent which would not have been held so a century ago.

On the other hand, there is a tendency to restrict or deny liability in the absence of negligence or wrongful intention. Professor Wigmore,[51] speaking of the principle enunciated by Blackburn, J., in *Rylands* v. *Fletcher*, says:

". . . the tendency may perhaps be said to be in many states to restrict to as few as possible the classes of situations to be governed by the principle. An example of the latter attitude is found in the masterly opinion of Mr. Justice Doe, in *Brown* v. *Collins*, 53 N. H. 442."

Leaving out of sight, for the moment, the influence which modern legislation may have on the views of judges as to the common law,[52] we should predict that the present tendency of the courts will continue, and that the ultimate result will be reached in the near future; *viz.*, that, in cases of blasting, the exceptional doctrines of absolute liability will no longer be applied, and that decisions in favor of plaintiff will be based upon negligence.[53] Should this be so, just results will be reached in blasting cases. And, at the same time, the modern statements of the law will tend to legal symmetry; while "most of the serious difficulties and complexities which now exist" would be "eliminated." [54]

(*To be concluded.*)

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[51] 7 HARV. L. REV. 441, 455, note 3.

[52] As to which see the second instalment of this article which is to appear in the March issue.

[53] In 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 80, the author says that, under modern law, "a defendant in trespass can always excuse himself by showing that the injury complained of was purely accidental, and that it happened without any fault of his." Later, on page 84, he says: "That some degree of fault or blameworthy negligence is essential to liability for unintended harm wrought by things not dangerous *per se* goes without saying. In regard to damage done by things inherently dangerous, we cannot speak with such certainty; for the grounds of liability in this field have not been fully canvassed and the subject has not been generally understood. *Unquestionably the law must in the end reach the same basis as in the field of trespass.*" (The italics are ours.)

[54] See SALMOND ON TORTS, 4 ed., Preface, page v.